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* MAJOR OMISSIONS OF THE COURT OF APPEAL'S OPINION (P. 9)

Par 1 - The Bosley's also claim this 3.4 acre tract as a part of their 36 acres.

Par 2 - The Dollenberg Brother's Plat and Title Map was unrecorded. The Dollenbergs are also memebers of the Grand Lodge

Mr. Hessey's Testimony- all his testimony made reference to the main tract of the Grand Lodge farm. No evidence of any use or exclusive claim to the 3.4 acre tract lying across the Western Run.

Miss McIntyre's testimony- Description of the begining points of the Bosley tract, south side of Western Run were the same intersects the York Road, etc.

Other Bosley Witnesses- Three aged witnesses, Cedrone, Tawney and McCartha, who lived in the area never heard of the stream change or of Grand Lodges claim.

Right of Way granted by Bosleys' predecessor in title to the Maryland Gas Transmission Company in September 1930

Last par. of Opinion - issue was raised in motion for new ~~trail~~ TRIAL in lower court

Dollenberg Plat- omits Bosleys'property line, stones, Thornton Mill Road and small streams running into Western Run and the entire 36 acres tract of the Petitioner's land.

* Caused, in part, it is believed, by Judge Barnes following the Grand Lodges' brief instead of the testimony and the deeds filed in the evidence.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1468

KENNETH T. BOSLEY AND PHYLLIS B. BOSLEY, HIS WIFE,

Petitioners,

V.

THE GRAND LODGE OF ANCIENT FREE AND ACCEPTED MASONS OF MARYLAND, A MARYLAND CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

REPLY BRIEF OF PETITIONERS TO RESPONDENTS BRIEF IN OPPOSITION

OPINION BELOW

The opinion written by Judge Barnes of the Court of Appeals is fully printed as an Appendix to this brief beginning on page 9. The Order and Stipulation of the United States Dis-

trict Court is printed in the Petition's Appendix AA on page 32. The Order of the Lower Court by Judge Jenifer denying the plea of Res Judicata is printed on page 35 in the Petition's Appendix.

REPLY TO RESPONDENTS QUESTIONS PRESENTED

In reply to the errors of fact stated on page 2 of the respondent, Grand Lodge, brief, the following is cited:

1. The second line of the first paragraph states, "The parcel of land in question had been acquired by deed by the Respondent in 1927." This is false because how can a corporation acquire the parcel in question when no previous title chain of the Grand Lodge contained a 3.4 acre tract? The Grand Lodge's attorney merely had his surveyor (who in 1927 was unlicensed, as the statute for such licenses was not enacted until 1947 in Maryland) include part of the petitioner's property in their multi-page, complex description for the parcel of 262 acres, more or less, that was acquired.

2. The second line of the second paragraph is false because there was no testimony of the date of a sudden flood or a storm which would develop the alleged change of course in the river. The unlicensed surveyor, at the time, J. Spence Howard, was alleged to have placed a note on a plat "old stream bed." Since he has been deceased for many years any good forger could have added the notations and bearings on the plats at will.

   The Grand Lodge has produced no geologist or soil scientist to describe the soil strata which would prove an existence of an old stream if in fact one existed. The petitioners, the Bosleys, produced three aged witnesses who live in the area of the property

and they testified that they never heard of a stream change even though they fished and swam in the waters of the river since their early youth.

3. The fourth paragraph of page 2 states that the respondent claims title by adverse possession but they fail to state that the parcel in question was a part of a wooded tract of 36 acres claimed by the Bosleys and that the petitioner's predecessor in title granted a right of way across the property to the Maryland Gas Transmission Company in September 27, 1930. (Copy of this right of way agreement printed in the petition, Appendix B on page 19.) Part of this property was cleared and cultivated for ensilage corn began in 1960 by the petitioners. In 1965 the petitioners won First Prize at the Maryland State Fair for their corn entry from this parcel. The Baltimore Sunpapers called the corn "twice as tall as an elephant's eye" (13 feet tall).

In reply to the errors of fact stated on page 3 of the Respondent's, Grand Lodge, brief the following is cited:

1. Paragraph one fails to include that the Court of Appeals of Maryland, acting by one judge who wrote the opinion established for the first time a decision permitting a question of avulsion in a lower court's instructions to be correct which is contrary to the law pertaining to the original 13 states which formed their boundaries based on the English monument system of the superiority of the natural land monuments.

2. In answer to paragraph two there is no insinuation intended or contained in the petition except facts which show the small

circle of long time judicial connections of the respondent's, Grand Lodge, corporations to the Maryland Courts.

Mr. Hessey, the Grand Lodge's counsel for 40 years, and the main witness in this case who produced corporation records that he prepared and kept by his office, was not only on the same faculty with Judge Barnes of the Court of Appeals of Maryland but also was Dean of the University of Baltimore Law School for many years (non-ABA accredited) and at the same time Judge Barnes was the secretary of the Maryland State Board of Law Examiners.

Judge Barnes was formerly associated in Baltimore with the law firm of Anderson, Barnes, Coe and King. The Bar Register of 1964 lists the representative clients. The one client listed first is McCormick and Company. This company, which is the spice and extract firm now has a subsidiary company called "Maryland Properties." The firm is developing over 1,000 acres of land adjacent to Grand Lodge's property and to the north of the Bosley tract. They have built the Hunt Valley Inn on I-83 which is 5,280 feet approximately from the parcel which is the subject of this suit. The Hunt Valley Inn venture, which is a part of their Greater Baltimore Industrial Park, is reported by the corporation as costing 13 million dollars just for the building.

In addition the petitioners have just learned that Judge Barnes was a party to a suit involving his own land, located on the eastern shore, which went to the Court of Appeals of Maryland. The attorney who represented the other side was none other than Lewis C. Merryman who was on the brief for the petitioners in this case. *

Also Judge Smith of the Court of Appeals is

* Barnes vs Webster

a member of the Grand Lodge but he is to be commended in that he refused to sit in this case since he is a Mason. Judge Smith is a member of the Grievance Committee of the Grand Lodge.

REPLY TO RESPONDENTS STATEMENT OF THE CASE

In reply to page 4 of the Respondent's brief, the following comments are made:

1. Paragraph three stated by the respondents, "the record title remaining unchanged because the stream bed had changed by a sudden violent change, avulsion, rather than by erosion."

   The Bosleys, petitioners, claim title from their deed "to the southernmost bank of the Western Run, thence running with and bounding on the meanders of the South and Southwest side of said Run to the beginning." (Appendix A in the Petition)

   There is a big difference between southernmost bank under which the Petitioner claims record title and the "old stream bed" under which the Grand Lodge, respondent, claims.

2. Paragraph one of page five the Court of Appeals, by Judge Barnes in his opinion, incorrectly stated the additional questions raised under the heading of Conflict of Interest. Only after the trial was over a discovery was made that the Court Reporter was also a member of the Grand Lodge.

   Objections were made at the trial that Mr. Hessey was allowed to testify. These were overruled by the Court. However, these objections do not appear in the transcript that was finally prepared by the reporter, a Mason, a year after the memories of the trial had faded.

An additional conflict of interest that was not known until 1972 was that the Judge of the Lower Court, Walter M. Jenifer's, brother was a Grand Master of his lodge and a member of the Grand Lodge. His name was Daniel of St. Thomas Jenifer and since he is deceased this fact was not apparent at the time of the trial. Rule 18 of the Maryland Rules states that a judge who shall be connected by affinity with any party to an action shall be disqualified from sitting in such action. The petitioners, Bosleys, feel that Judge Jenifer had a duty to reveal the connection his family had with the Grand Lodge.

REPLY TO RESPONDENT'S ARGUMENT

I.

THE DECISION BY THE COURT OF APPEALS OF MARYLAND IN THIS CASE HAS DECIDED TITLE INVOLVING THE THEORY OF AVULSION OF A RIVER, BASED ON NO KNOWN SHIFT OF THE WATERS, THAT PLACES SIMILAR TITLES IN THE ORIGINAL 13 STATES IN CONFLICT WITH THOSE TITLES OF 29 OTHER STATES DEVELOPED UNDER ACTS OF CONGRESS BY THE U. S. PUBLIC LAND SYSTEM.

The respondents claim in their argument that no Federal Question was raised in the Lower Court. We do not agree. The respondents were the ones that used the authority of the Supreme Court in the Nebraska vs. Iowa, 143 U. S. 359 (1892) case to make the Lower Court give an instruction on avulsion, and alleging the River changed its course and further alleging the petitioners filled in an illusionary "old stream bed."

In reply to page six, paragraph two, the statement that the Court Reporter required five extensions of time because he was not paid is false. The reporter supplied letters stating reasons of back log of work and vacation periods. Each of the five extensions were granted by orders of the Court after motions were submitted, examined, and

granted. The reporter was paid in most instances in advance.

Also the statement that Mr. Bosley said that two of the key witnesses were Masons is incorrectly stated. The Grand Lodge had four witnesses who were Masons and on the payroll of the Grand Lodge. They were Cassell, Hessey, Smith and Tyrie. Cassell was the owner of the survey firm that made arrangements to purchase the records of J. Spence Howard, the deceased surveyor. Hessey has been counsel for 38 years, Smith was the resident manager. Tyrie was the tomb stone cutter who supplies monuments for the deceased's graves. Mr. Hessey's son at one time operated the funeral home that had the burial contract with the Grand Lodge.

In addition the Court's witness who was directed to execute the Warrant of Resurvey was Ulrich, who is regularly hired by the Dollenberg Brothers to do subcontract survey work.

The Dollenberg Brothers, surveyors, whose plat is illustrated in the Opinion of the Court of Appeals, are also members of the Mason Order.

In reply to paragraph two of page seven the reference to charitable organization was raised because during the course of the trial the counsel raised the point in opening and closing statements and pleaded to those present that the function of the Masonic Home was one of charity for old people. The selection of the old people for the home is done in secret. Only a token few are charitable cases. The majority pay their way when they turn over all their possessions, including social security, pensions and insurance to the Grand Lodge. Only a handfull of the thousands of applications are accepted as the facilities on the 420 acres of land are limited in size to about a 100 guests. Thus the statements raised in opening and closing statements are not in the record and these are not recorded but the counsel for the Grand Lodge fully utilized the effect of charitable organization.

One of the grotesque features of this case is that the present counsel, Charles C. W. Atwater, if he were a member of the Mason order, is that he would drop from membership. One of the primary causes to terminate membership is due to violations of income tax laws. Mr. Atwater, present counsel in this case, was indicted for income tax violation by the Federal Grand Jury and subsequently fined. (Cited in United States vs. Charles C. W. Atwater, Criminal Case - United States District Court for the district of Maryland.)

Mr. Atwater's law partner, Walter Mylander, Sr., deceased, originally prepared the erroneous land description that is the subject of this case. Mr. Mylander also was a member of the Grand Lodge and an attorney for the title company which guaranteed the title at the time the Grand Master of the Grand Lodge, Warren Seipt, was the vice president of that title company.

We therefore again submit that the Lower Courts in Maryland have decided an important state question, based on the law applicable only to other states in the midwest, in a way that is in conflict with the English common law title system of the 13 original states. (See Rule 19 b, Rules of the Supreme Court)

The respondents have stated in all their proceedings to the effect "we could not prove where the Western Run was in 1850, but now after we have waited 45 years since 1927 when we purchased the property, we are going to make you (Bosleys) prove where it was at your expense even though we know it is impossible. This is the same situation as described in Nebraska vs. Iowa, No. 17, Orig. Supreme Court, April 24, 1972.

Thomas Jefferson was chairman of the committee in the Continental Congress which on May 20, 1785 adopted the public land rectangular system for sub-dividing lands in the midwest. The Act of Congress on March 1, 1800 prescribed that the boundaries of the public land surveys as they

were originally established are unchangeable. These acts have no application to the State of Maryland but the respondent, Grand Lodge, and the Maryland State Courts have adopted their application in conflict with the English common law natural boundary system of surveys. (See the related pending case of the Supreme Court as follows: No. 27, Orig., Ohio vs. Kentucky 1972 & No. 30, Orig., Michigan vs. Ohio 1972.)

II.

THE PROCEDURE IN EJECTMENT AND THE RULES OF THE WARRANT OF RESURVEY HAVING NOT BEEN COMPLIED WITH, AND THE POWERFUL CONTROL OF THE MASONIC ORDER OF THE LOWER COURTS HAVE DENIED THE PETITIONERS THEIR CONSTITUTIONAL RIGHTS UNDER DUE PROCESS OF LAW.

In reply to paragraph two of page eight the sketch plat set forth with the opinion of the Court of Appeals was one prepared under the direction and control of Mr. Walter Mylander, Sr., and prepared by his unlicensed surveyor, J. Spence Howard. Enclosed in the appendix is a copy of a plat prepared by the Maryland Gas Transmission Company which shows no "old stream bed" to exist and also shows only four markers left in the ground in 1930 before the pipeline Construction and roadways by the pipeline were under bulldozing. The date of this survey and plat was ~~September 27~~ October 4, 1930. (Copy attached in the rear of this brief.)

The Maryland Gas Company could not obtain permission to cross in the center of the Grand Lodge's property in 1930 for the construction of the gas line in a straight path. Therefore, the gas line was routed around the Grand Lodge's property. In the depression of 1930 the petitioner's grandfather, Thomas O. Matthews, a Quaker, was delighted to receive $75.00 for the granting of a right of way without a survey and without counsel. (Appendix B, Petition page 19, extract of deed in Bosleys' chain of title.)

Wherefore, since some of the judicial officers of the Lower Court were at the same time active members of the Grand Lodge, and other proceedings in this matter were so far departed from the accepted and usual course of judicial actions, certiorari is required so as to exercise the power of this Court supervision. (Re Rule 19b.)

III.

THIS EJECTMENT PROCEEDING IS RES JUDICATA AS THE RIVER BOUNDARY LINE WAS DECIDED BY THE UNITED STATES DISTRICT COURT IN 1966 AND THE SPECIAL PLEA - RES JUDICATA - SHOULD HAVE BEEN GRANTED IN THE LOWER COURTS.

In reply to page nine, first paragraph, the statement made that, Petitioners fail to quote the stipulation (referring to the stipulation and order of the case in the Federal Court between the parties which is the basis of res judicata). The stipulation is fully printed in the Petition on page 32 and 33.

Also the respondents infer that the parcel is involved in the stipulation. This is false from the petitioners Bosley's point of view. Only one parcel of 36 acres is claim by them and only one boundary line. That boundary line is approximately 8,000 feet long and is a natural boundary defined as the present southernmost bank of the Western Run River.

This was the same natural boundary line and the same 36 acre tract that was considered by Judge Thomsen when he directed the stipulation in 1966.

However, within the last six years, Donald Jett, a Columbia City builder and president of the Jett Development Corporation, has become Chairman of the Grand Lodge's Executive Committee. A sewer line has been engineered and approved by the County and construction following the Western Run River is planned for next year. An interstate highway interchange is now

planned to cross east and west just above the Grand Lodge's property. The Grand Lodge does not have road access on the West because of the interstate expressway and has only limited access on the East because of the Petitioner's property. Therefore, by gaining road access to the north, at any costs, disregarding the Federal Court decision, the Grand Lodge can sell their property for development. Mr. Jett, testified before the Zoning Appeal Board of Baltimore County this month in the case of the Grand Lodge and Maryland Properties, Inc. vs. Carroll Lawrence that the property has been offered for sale. (Grand Lodge opposing the zoning for the construction of a Ramada Inn adjacent to their property). (This Appeal Board is the same one Vice-President Agnew sat on a few years ago.)

Therefore in this case the State Courts should not be allowed to disregard an important question of title settled by a federal court. When the pipe line goes through Alaska and questions of title arise this Court will be required to settle the issues. This important federal question should be reviewed by this Court so that proper determination of land titles of all the 50 states can be made when the Natural Gas Act of Title 15, U. S. C. is involved or a similar condemnation for an Alaskan Oil Line.

CONCLUSION

WHEREFORE, for the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

Kenneth T. Bosley, and
Phyllis B. Bosley,
Petitioners

June 9, 1972

APPENDIX

(The Opinion is contained in the following pages, but is also extracted ~~from~~ IN the petitioner's brief.)

M A N D A T E

Court of Appeals of Maryland

No. 13, September Term, 1971

Kenneth T. Bosley, et ux.	Appeal from the Circuit Court for Baltimore County
	Filed: March 15, 1971
v.	August 3, 1971: Motion to extend length of appellants' brief filed.
The Grand Lodge of Ancient Free and Accepted Masons of Maryland	August 4, 1971: Motion granted, not to exceed 65 pages.
	August 20, 1971: Motion for permission of Court to review original exhibits
	August 23, 1971: Motion granted.
	August 30, 1971: Motion to dismiss appeal filed by appellants.
	September 7, 1971: Motion to strike appellee's brief from record filed.
	September 8, 1971: Letter from appellee re above motion
	September 13, 1971: Motion to extend time for filing reply brief, etc. filed.
	September 13, 1971: Motion to dismiss appeal denied.
	September 13, 1971: Motion to strike appellee's brief denied.
	September 13, 1971: Motion to extend time, etc. denied.
	September 13, 1971: Motion for Court to review original plats granted.

November 10, 1971: Judgment affirmed, the appellants to pay the costs. Opinion by Barnes, J.
December 10, 1971: Motion for reargument filed.
December 13, 1971: Motion denied.

STATEMENT OF COSTS:

In Circuit Court:

Record	$ 70.00
Stenographer's Costs	646.50

In Court of Appeals:

Filing Record on Appeal	$ 20.00
Printing Brief for Appellant	459.21
Record Extract No. 2	56.41
Portion of Record Extract-Appellant	785.20
Appearance Fee-Appellant	
Motion for Reargument	5.00
Printing Brief for Appellee	230.55
Portion of Record Extract-Appellee.	785.20
Appearance Fee-Appellee	10.00

STATE OF MARYLAND, ss:

I do hereby certify that the foregoing is truly taken from the records and proceedings of the said Court of Appeals.

In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Appeals, this fourteenth day of December A.D. 1971.

SEAL

s/ James H. Norris Jr.
Clerk of the Court of Appeals of Maryland.

Costs shown on this Mandate are to be settled between counsel and NOT THROUGH THIS OFFICE

OPINION OF THE COURT OF APPEAL OF MARYLAND

No. 13, September Term, 1971--Filed November 10, 1971

KENNETH T. BOSLEY, ET UX.
vs.
GRAND LODGE OF ANCIENT FREE AND ACCEPTED MASONS OF MARYLAND

Appeal from the Circuit Court for Baltimore County, Walter M. Jenifer, Judge.

Argued by Kenneth T. Bosley, in proper person, Sparks, Maryland; (Lewis C. Merryman, Towson, Maryland, on the brief) for appellants.

Argued by Charles C. W. Atwater for appellee.

Argued before HAMMOND, C. J.; BARNES, McWILLIAMS, FINAN, SINGLEY AND DIGGES, JJ.

Judgement affirmed.

BARNES, J.---

This appeal involves an action in ejectment filed in the Circuit Court for Baltimcre County by the appellee, The Grand Lodge of Ancient Free and Accepted Masons of Maryland, a Maryland Corporation (Grand Lodge), against the appellants, Kenneth T. Bosley and Phyllis B. Bosley, his wife.

The land involved is a 3.4 acre tract in the Eighth Election District of Baltimore County to which the Grand Lodge claims good record title

and title by adverse possession. The two principal questions before us are whether the trial court erred (1) in its instructions to the jury in regard to the elements of adverse possession and (2) in declining to grant the motion of the Defendants-Appellants for a directed verdict or their motion for a judgment n.o.v. because of insufficient evidence in the case for the jury to find for the plaintiff, Grand Lodge, on the basis of either adverse possession or legal record title. The appellants raise additional questions to which reference will later be made.

Grand Lodge has owned and used the property in Baltimore County known as "Bonnie Blink" for many years as a lodge home for elderly members and as a farm. It acquired Bonnie Blink by a deed from John B. Wailes and wife, dated June 30, 1927, and duly recorded among the Land Records of Baltimore County in Liber W.P.C. No. 645, folio 333, etc., for 266.1 acres of land. The description in this deed is divided into two parts - one for 262.7 acres, the other for 3.4 acres, the latter being the parcel involved in this case. The description was prepared in June 1927 by the late J. Spence Howard, a surveyor, and is based on a survey made by him. This plat was introduced into evidence as "Court's Exhibit No. 2." A title map of Bonnie Blink was prepared by Dollenberg Brothers, surveyors and civil engineers, dated

March 9, 1960, with a scale of one inch equals 200 feet. It bears the notation, "Note: This plat is traced from a plat prepared by J. Spence Howard, Civil & Consulting Engineer." It was introduced into evidence as "Plaintiff's Exhibit No. 5." For convenience in showing the courses and distances as well as monuments used to indicate the boundaries of the 3.4 acre tract, a portion of the Dollenberg map has been reproduced and contains certain notations added by this Court. The reporter is directed to include this portion of the Dollenberg map as part of this opinion.[1] On the Dollenberg map the 20 foot right of way of the Maryland Gas Transmission Corporation over the 3.4 acre tract is indicated. This did not appear on the Howard plat inasmuch as it was granted after the Howard plat was prepared in June 1927. The 3.4 acre parcel is also shown on the Warrant of Resurvey plat prepared by William G. Ulrich, Jr., the Baltimore County surveyor. This plat was introduced into evidence as "Court's Exhibit No. 3."

The deed of June 30, 1927, was apparently prepared by Walter C. Mylander, Sr., a member of the Maryland Bar. After an elaborate metes

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[1]The Dollenberg map, rather than the Howard plat, is used because it is more easily and clearly reproduced.

and bounds description of parcel 1 containing 262.7 acres of land, more or less, the deed then describes parcel 2 as follows:

"Beginning for the second thereof at a point on the south side of Western Run, said point being at the end of the north nine degrees thirty three minutes west two hundred and five and 3/10 (205.3) foot line of the tract containing two hundred and sixty two and 7/10 (262.7) acres, more or less, hereinabove first described, said point of beginning being also at the Junction of the south side of the present location of Western Run and the west side of the Old location of Western Run and running thence by a line across the present location of Western Run north twenty eight degrees forty seven minutes west one hundred and ninety eight and 4/10 (198.4) feet to stone marked No. 9, G.L.M. set on the west bank of the Old location of Western Run and running thence and binding on the southernmost side of the old stream bed of Western Run the seven following courses and distances, north four degrees thirty seven minutes west one hundred and eighteen and 8/10 (118.8) feet to stone marked No. 8, G.L.M. north fifty one degrees twenty five minutes west ninety six and 65/100 (96.65) feet to stone marked No. 7, G.L.M. south seventy nine degrees thirty nine minutes west one hundred and thirteen and 25/100 (113.25) feet to stone marked No. 6, G.L.M. south fifty four degrees twenty seven minutes west one hundred and thirteen and 3/10 (113.3) feet to stone marked No. 5, G.L.M. south sixteen degrees twenty two minutes west two hundred feet to stone marked No. 4, G.L.M. south eight degrees twenty minutes east two hundred and thirty feet to stone marked No. 3, G.L.M. and south twenty three degrees twenty minutes east one hundred and thirty nine and 18/100 (139.18) feet to stone marked No. 2, G.L.M. planted at the junction

of the northwest side of the present location of Western Run and the east side of the old location of Western Run and running thence by a line across the present location of Western Run, south thirty eight degrees twenty minutes east eighty three and 4/10 (83.4) feet to the end of the south seventeen degrees thirty nine minutes west one hundred and eighty seven and 3/10 (187.3) foot line of the tract containing two hundred and sixty two and 7/10 (262.7) acres hereinabove first described, thence along the southeast side of Western Run and binding reversely on the lines of the said whole tract containing two hundred and sixty two and 7/10 (262.7) acres hereinabove first described the three following courses and distances, north seventeen degrees thirty nine minutes east one hundred and eighty seven and 3/10 (187.3) feet north thirty two degrees thirty six minutes east two hundred and sixty and 2/10 (260.2) feet and south sixty four degrees thirty minutes east one hundred and fifteen feet to the place of beginning.

"Containing three and 4/10 (3.4) acres of land, more or less."

The plaintiff, Grand Lodge, offered in evidence the testimony of George Walter Tyrie, an "old-time" stone cutter since 1904, who produced his original ledgers from 1927. These included his bill addressed to the Grand Lodge in care of Walter C. Mylander, entered on June 25, 1927, for 18 granite land markers, eight inches by eight inches by two feet, marked "G.L.M. 1" to and including "G.L.M. 18." His original diagram for these markers was produced and introduced into evidence. Mr. Tyrie testified that his brother delivered these markers, moved them from place to place at the site but the sur-

veyors set the markers. Markers G.L.M. 2 through G.L.M. 8 were placed at the end of each call on parcel 2. These locations were established by the Ulrich survey and were shown to the jury at the time the jury inspected the property.

The Maryland Surveying and Engineering Company had purchased the records of J. Spence Howard from his estate. They were produced at the trial by James R. Cassell of that Company. At the request of the Grand Lodge, Mr. Cassell inspected the property in question after the appellants had asserted their claim to it and located stones numbers G.L.M. 3, 4, 5, 6 and 9 in place in the ground. He saw what appeared to be stone number 8 lying on top of the ground. He could not locate stones numbers 2 and 7. When he revisited the property in 1969, the monuments were gone. When asked if there was any evidence on the ground to indicate whether there had been an old stream bed as indicated by the Howard plat, Mr. Cassell testified that there was a depressed area that "could have been a stream bed that had been eroded and filled in." When asked his opinion in regard to how the change could have taken place between the "old stream bed" and the present location of the bed of Western Run, he stated that he was of the opinion that instead of a gradual erosion of the bank, Western Run "had cut right on through there rather than going around the long

way, just flowed and made its own river beds stream, just cut off part of the loop going around it."

Mr. Ulrich located the conflicting claims of the parties on the land and indicated these conflicting claims on his Warrant of Resurvey plat. He used the metes and bounds description of the Grand Lodge deed and plat to fix the locations of stones 2 through 8. There was no metes and bounds description of the division line in the Bosley title, the call being to bind on the southerly side of Western Run. In order to locate the lines claimed by the Bosleys, Mr. Ulrich used adjacent titles to locate these lines. Generally speaking, the Bosley lines on the west, north and east of parcel 2, the 3.4 acre tract, follow the outer perimeter of the "old stream bed" appearing on the plat included in this opinion, with depths varying from 400 feet to 75 feet. To the west, north and east of the Bosley lines is the land of Charles V. Roller. Mr. Ulrich stated that there were indications in the other descriptions that there had been a stream at one time in the location of the "old stream bed" delineated on the Howard plat. He located a beginning stone of the Roller land adjacent to the Bosley land and marked the stone on the Warrant of Resurvey plat "stone found Bosley and Roller." The calls in the

Roller deed indicated to him that the Roller land bounded on a "body of water." It was indicated that the Roller beginning stone was on the north side of Western Run. Mr. Ulrich concluded that he could not "decide title lines" and would not say what was the old line of Western Run, but he had evidence from the Howard plat that "Western Run went in this area at one time." He stated that Mr. Howard was as "competent as any other man in the business at the time."

John H. Hessey, Sr., a member of the Maryland Bar for 57 years, had been associated with the Grand Lodge for more than 50 years. He was Master of his Lodge in 1927. He had been counsel for the Board of Bonnie Blink and for the Grand Lodge since 1935 and still is. He had custody of the Grand Lodge minute books and records. He was familiar with the circumstances surrounding the purchase of the property by the Grand Lodge in 1927. The Grand Lodge employed Spence Howard to prepare the Howard plat in evidence in the case. Mr. Hessey produced the real estate tax receipts of the Grand Lodge from 1928 to date. These receipts showed that the Grand Lodge records showed that in 1938 it had given permission to members of the Green Spring Valley Hunt Club to hunt across the property. An agreement concerning conservation of the soil of the

property in 1942 was produced. Also produced from Grand Lodge records was a 1944 contract for cutting timber. All of the agreements included the 3.4 acre tract. Timber was cut again in 1959.

The Grand Lodge minutes of September 16, 1959, reported that Bosley claimed title to three acres, more or less, on which timber was being cut. It was noted that the matter had been reviewed by Bosley with counsel for the Grand Lodge, plats were exhibited and Bosley was informed that he had not title to the acreage he was apparently claiming.

From his own records, Mr. Hessey testified that shortly prior to March 12, 1965, he received a report from Frank L. Smith, Jr., Executive Director of the home, that bulldozers were bulldozing part of the property. Mr. Hessey went out to the property with Mr. Smith and saw two men bulldozing on the 3.4 acre parcel. These two men disregarded anything he had to say. He had a conversation with Mr. Bosley who came to Mr. Hessey's office on March 12, 1965. Mr. Bosley stated that he had not done the bulldozing.

Mr. Hessey identified the granite marker which had been brought to the courtroom. The marker was eight inches by eight inches by two feet in size. He stated that it was the marker found by him when he visited the property in March 1965. He had kept two or three small pieces of granite which had been chipped off the top of the marker but these pieces did not include the "G.L.M." letters.

Mr. Hessey identified a certified copy of a deed, dated November 11, 1850, from Elizabeth Webster, et al. to Thomas Matthews, recorded among the Land Records of Baltimore County in Liber H.M.F. No. 17, folio 35, et seq., and previously introduced into evidence as "Court Exhibit No. 5," and admitted that this was the

background deed in the titles of both the Grand Lodge and the Bosleys.

On cross-examination by Mr. Bosley, Mr. Hessey was asked whether he had called the police or made any official complaint in regard to the tresspass of the bulldozer operators on Bonnie Blink land. Mr. Hessey replied: "No, I * * * interrogated you and tried to find out from you who was responsible for the men on there, and you denied to me at that time that you were responsible for it, and then I heard you say here the other day, that you * * * had employed them * * *."

The testimony of Frank L. Smith, Jr., Executive Director of the home, indicated that he had first been employed in 1955 by the Grand Lodge to operate the home. He had been shown around the Bonnie Blink property and had located the stone markers on parcel no. 2, the 3.4 acre tract. He generally confirmed the testimony of Mr. Hessey in regard to the bulldozer operators and the location of the stone markers in March 1965.

The Tax Assessment Records of Baltimore County since 1928 were introduced into evidence and showed that the Grand Lodge had been assessed for 266 acres for the Bonnie Blink property.

Mr. Bosley, on behalf of the defendants and appellants, called as his own witnesses former Grand Masters of the Grand Lodge, i.e., William Norman Penn, xxxxxxxxxxxxxxx Edward R. Saunders and William B. Stansbury, Jr. Mr. Stansbury, who is also a member of the Maryland Bar, testified that so far as he knew "from the period 1927 to 1965 there had been no question at all about the ownership of the property or any question of title or any dispute at all." He recalled that timber had been cut on parcel no. 2, the 3.4 acre tract, by the Grand Lodge.

The Bosleys produced the testimony of Miss Katherine A. McIntyre, a member of the Maryland Bar, who identified the Webster-Matthews deed of November 11, 1850, as the deed out of the common owner of the land of the Grand Lodge and the Bosleys to the Bosley's predecessors in title. The description in this deed begins in the Center of the York Turnpike, proceeds in a northwesterly direction and then calls "to the southernmost bank of Western Run, thence running with and bounding on the meanders of the south and the southwest side of the said Run to the beginning...." No survey was made of the location of Western Run at that time. This is the division line which is in dispute between the parties on the question of legal record title.

Russell M. Herbert, a registered land surveyor, was also called as a witness for the Bosleys. Mr. Herbert had made a survey for the Bosleys in 1966 and prepared a plat, the lines of which follow the present line of Western Run. These lines were transposed to the Warrant of Resurvey plat prepared by Mr. Ulrich, to which reference has already been made. Mr. Herbert stated that he did not see any old stream bed. In his opinion a natural monument would take precedence over an artificial monument provided they call within reasonable calls. Reasonable calls of distance would only apply if there were a conflict between a call to a natural monument and a call to an artificial monument. He saw no evidence of a former stream bed in 1960 when he was on the property, and he thought it was impossible for Western Run to have changed "that much" in the period of 1850 to 1960.

The jury found a verdict for the plaintiff, Grand Lodge, but awarded no damages.

Additional facts will be given where thought necessary in the following discussion of the legal questions involved.

(1)

We will first consider the questions raised by the Bosleys to the trial court's charge to the jury. The lower court prepared its proposed instructions in typewritten form and copies were given to counsel and Mr. Bosley before they were read to the jury. The instructions are full, complete and carefully considered. They comprise seven printed, single-spaced pages in the record extract. In the instructions the trial court, to a substantial extent, used our language in the case of Blickenstaff v. Bromley, 243 Md. 164, 220 A.2d 558 (1966), in which Chief Judge Prescott, for the Court, reviewed the Maryland law in regard to the elements necessary to establish title to land by adverse possession.

The Bosleys objected to the lower court's charge to the jury on the ground that the factor of "visible" was missing from the charge. Judge Jenifer pointed out that the word "visible" was included in the charge and that, in any event, this Court in Blickenstaff "did not use the word 'visible' as one of the requirements of title by adverse possession." It was used later in the same context as the trial court had used it in connection with the word "notorious."

In the charge, the trial court instructed the jury, in part, as follows:

> "The essential elements of adverse possession are that the possession must be actual, open, notorious, exclusive, hostile and continuous for the statutory period of twenty years under a claim of title or ownership.
>
> You will note from the deed to the Grand Lodge dated June 30, 1927, from John B. Wailes and wife, the parcel in dispute is described as the second parcel in said deed by specific metes and bounds and courses and distances,

is recited to contain 3.4 acres of land, more or less, and consequently the Plaintiff has claim of title or ownership thereto. It is your function to decide whether or not the Plaintiff exercised the elements of possession that I have just outlined for a period of twenty years after receiving the deed referred to. If you are satisfied by a preponderance of the evidence that the Plaintiff did exercise these elements of possession during a twenty-year period after the deed of June 30, 1927, then the Plaintiff would have acquired title by adverse possession. If, on the other hand, you find that the Plaintiff did not exercise these elements of possession after June 30, 1927, for a period of twenty years, the Plaintiff would not have acquired title by adverse possession.

"In determining the issue of adverse possession and the acts of possession exercised by the Plaintiff, you should consider several factors. If you find from the evidence that after acquiring the conveyance of the parcel of land in question, the Plaintiff did in fact install granite monuments at the corners thereof, this would be evidence of actual, open and notorious possession and ownership on the part of the Plaintiff. It was not necessary for the Grand Lodge to enclose the parcel by a fence to show its assertion of ownership.

"In determining whether there has been actual possession of property, there must be considered its character and locality, and the uses and purposes for which it is naturally adapted, since possessory acts of an outlying and uncultivated piece of land may be proved by acts of ownership somewhat different from those required with regard to land under enclosure and actual cultivation.

"It is sufficient if the acts of ownership

are of such a character as to openly and publicly indicate an assumed control or use such as is consistent with the character of the premises in question. The standard to be applied to any particular tract of land is whether the possession comports with the ordinary management of similar lands by their owners, and if so, it furnishes satisfactory evidence of adverse possession. In general, it may be said that those acts which go to make possession actual, likewise suffice to make it visible and notorious.

"In order to ripen into title, adverse possession must be exclusive, that is the claimant must hold possession of the land for himself, as his own. * * *.

"The 'hostility' essential to acquisition of title by adverse possession does not necessarily import enmity or ill will, but rather that the claimant's possession be unaccompanied by any recognition, express or inferable from the circumstances, of the real owner's right to the land."

We stated in Blickenstaff, supra:

"Little need be added to show that the possession was 'open and notorious.' In Bishop v. Stackus, supra, this Court stated that, in general, it may be said that those acts which go to make possession actual, likewise suffice to make it visible and notorious. In the instant case, the testimony is undisputed that the entire community, for a period far exceeding 20 years, considered the corner to be owned by the Blickenstaffs and their predecessors. Even Mr. Hoffman, whose family at one time owned the Bromley property, testified that he believed the Blickenstaffs' predecessor owned the parcel. We think and therefore hold that the possession was open, visible and no-

torious, and under claim of title."
(243 Md. at 172, 220 A.2d at 562; emphasis
in the opinion in Blickenstaff.)

It is apparent that the charge on this point is entirely in accord with our holding in Blickenstaff, as indeed it was on all of the elements of adverse possession.

We see no error in the lower court's instructions to the jury.

(2)

The lower court properly denied the motions of the Bosleys for a directed verdict and, after the adverse verdict, for a judgment n.o.v., in that, in our opinion, there was sufficient evidence in the case for the jury to find for the plaintiff, Grand Lodge, on the basis that it had title either (a) by way of adverse possession or (b) by way of record legal title.

In considering a denial by the trial court of a motion for a directed verdict or for judgment n.o.v., we must accept as true the evidence of the adverse party and must draw such inferences of fact from such evidence as may be reasonably and fairly deducible therefrom. Mondawmin v. Kres, 258 Md. 307, 314-15, 266 A.2d 8, 12 (1970) and cases therein cited.

(a)

In our opinion there was ample evidence of adverse possession by the Grand Lodge to submit to the jury.

The Grand Lodge entered into possession of the land in question under claim of title by virtue of the deed of June 30, 1927, apparently prepared by Walter C. Mylander, Sr., based upon the Howard plat and a description prepared by Mr. Howard. The tax bills and the Baltimore

County Tax Assessment Records show the property subject to taxes in the name of the Grand Lodge since 1928. In 1930 the claim of title is further shown by the execution by the Grand Lodge to Maryland Gas Transmission Corporation of a deed dated December 22, 1930, duly recorded with a plat, granting a right of way across the 3.4 acre tract. The description in the 1930 deed begins at a stake being south 23 degrees 20 minutes east 32 feet from a certain stone marked G.L.M. 3, a corner in the lands of the grantor. The easterly end of the line calls to a stake being north 4 degrees 37 minutes west 21 feet from a set stone marked G.L.M. 9, a corner in the lands of the grantor. Mr. Ulrich considered this deed of December 22, 1930. Both the testimony of Mr. Hessey and of Mr. Stansbury was that the Grand Lodge had been in possession under claim of title under the deed of June 30, 1927.

There was also, in our opinion, sufficient evidence of an actual, open, notorious and exclusive possession by the Grand Lodge, bearing in mind the "character and locality" of the land and "the uses and purposes for which it is naturally adapted." See Goen v. Sansbury, 219 Md. 289, 296, 149 A.2d 17, 21, 22 (1959) quoted with approval in Blickenstaff, supra. This evidence of acts which make the possession actual also make it visible. Blickenstaff v. Bromley, supra.

The evidence is as follows: the testimony of Mr. Tyrie of the making of the granite markers, their transportation to the subject property by his brother and their installation by the surveyor in eight locations as G.L.M. 2 through G.L.M. 9. These monuments were visible and were seen by Mr. Smith in 1955 when he became Executive Director of Bonnie Blink. They were seen by Mr. Hessey when he visited the property in 1965. They were seen by Mr. Cassell when he visited the land in January, 1966 but he was not able to locate them upon his reinspection of the

property in 1969. The Maryland Gas Transmission Corporation deed of December 22, 1930, describes the center line of its granted right of way with reference to the stones G.L.M. 3 and G.L.M. 9. The minute books of the Grand Lodge show permission given in 1938 to the Green Spring Valley Hunt Club to hunt across the property as well as contracts for the cutting of timber in 1949 and in 1959. Mr. Ulrich, although unable to locate stones G.L.M. 2 through G.L.M. 9, did locate stone G.L.M. 1, the top of which was approximately eight inches above the ground level.

(b)

There was sufficient evidence, in our opinion, to submit to the jury on the question of Grand Lodge's record legal title, i.e., that the original title line in the 1850 deed was the line used by Mr. Howard when he made his 1927 survey. The Howard plat showed the location of Western Run in approximately its present position, but also showed an "old stream bed." Mr. Howard's survey plats and notes were properly introduced into evidence in view of our decision in Klavens v. Siegel, 256 Md. 476, 481-83, 260 A.2d 637, 639, 640 (1970), and cases therein cited. Mr. Howard's notes were, however, confirmed in part by other testimony. Mr. Cassell testified that, when he visited the property the first time, there was a depression which could haven been an old stream bed but which had eroded and filled in. The Dollenberg plat picked up Mr. Howard's notation in regard to the old stream bed, and this notation was again carried forward by Mr. Ulrich on his Warrant of Resurvey plat.

Mr. Cassell testified, in effect, that if the stream bed had changed from the location shown on the Howard plat, such a change would have been a violent cut which cut off part of the loop going around it. Mr. Ulrich also testified that the change in location of the stream bed may have

been occasioned by a violent cut. This evidence, in our opinion, was sufficient to justify the submission by the lower court to the jury of whether there had been an avulsion, rather than a gradual erosion.

The rule is stated by Mr. Justice Brewer, speaking for the Supreme Court of the United States, in Nebraska v. Iowa, 143 U.S. 359, 360-61, 12 S.Ct. 396, 397, 36 L.Ed. 186, 187-88 (1892), as follows:

> "It is settled law that when grants of land border on running water, and the banks are changed by that gradual process known as 'accretion,' the riparian owner's boundary line still remains the stream, although, during the years, by this accretion, the actual area of his possessions may vary * * *
>
> "It is equally well settled that where a stream, which is a boundary, from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary; and that the boundary remains as it was, in the center of the old channel, although no water may be flowing therein. This sudden and rapid change of channel is termed, in the law, 'avulsion.'"

See 2 W. Blackstone, Commentaries 262; Gould on Waters § 156 (2nd ed. 1891); 93 C.J.S. Waters §§ 76, 79. See also Causey v. Gray, 250 Md. 380, 387, 243 A.2d 575, 581 (1968).

The lower court correctly instructed the jury:

> "The issue of fact (on the question of record title previously explained) for you to determine, therefore, is whether or not the stream known as Western Run between the year 1850 and the year 1927 changed its course. If you find that this stream did not change its course over

these years, then the outlines of the property of the Defendants would include the parcel of land in dispute. If, however, you find that this stream did change its course from a former location to its present location and did so in a gradual manner by the natural process of erosion, the land in question would have been added to the land of the Defendants and their predecessors in title by what is known in the law as accretion and the boundaries of the property of Mr. and Mrs. Bosley would thereby have been extended to include said land and the present boundaries of their property would be the southernmost side of Western Run as it now exists. If, on the other hand, you find that this stream did change its course from a former location to its present location and did so in a sudden manner as the result of a flood thereby cutting it off from a larger tract of which it was a part, then, in that event, the parcel in dispute would not have been added to the property of the Defendants and title thereto would remain in the Plaintiff, the Grand Lodge of Maryland.

As we have indicated, there was sufficient evidence to submit to the jury and to support its verdict on the issue of record legal title.

(3)

The Bosleys raise several additional questions before us, all of which, in our opinion, are without merit and of which disposition can be quickly made.

(a)

The Bosleys contend that the lower court should have sustained their demurrer to the declaration filed by the Grand Lodge in this case. Maryland Rule T40 states what a declaration shall contain, i.e.:

"(1) A statement that the plaintiff had been in possession of the land described,

(2) A description of the land sufficient to enable it to be located,

(3) A statement that the defendant ejected the plaintiff therefrom and retains possession thereof,

(4) The amount of damages claimed by the plaintiff."

The declaration avers that the Grand Lodge was in possession on March 8, 1965, of the 3.4 acre tract in the Eighth Election District of Baltimore County and then sets out its metes and bounds description from the deed of June 30, 1927, already quoted in full earlier in this opinion. It then averred that the Bosleys on March 8, 1965, wrongfully entered the land and ejected Grand Lodge from it and since that date have retained and still retain possession of the land. The Grand Lodge claims recovery of the land and damages of $10,000.00. The point of the Bosleys appears to be that the plaintiff, Grand Lodge, alleged that it was in possession of the land on March 8, 1965, and not that it had been in possession as stated in Rule T40 (1), stating that the plaintiff must establish adverse possession at the time the action is brought. This latter observation is accurate so far as proof is concerned; but the plaintiff need only aver that he was in possession of the land when ejected by the defendant which is what Rule T40 requires, viz., that he had been in possession when the defendant ejected him. There is no requirement that the plaintiff spell out in the declaration the nature of his title or possessory interest which gives him the right to possession.

It may be added that in the Bill of Particulars filed by the Grand Lodge, the time the plaintiff took possession under the deed of June 30, 1927, the making of a survey by Mr. Howard, the placing of boundary stones and that the plaintiff had remained in continuous and exclusive possession of

the subject property from June 30, 1927, until ejected by the defendants on March 8, 1965, are all set forth, as well as the items of damages claimed. We see no error in the overruling by the lower court of the demurrer to the declaration.

(b)

The Bosleys on October 14, 1966, filed a special plea of res judicata in which they alleged that in the case of Atlantic Seaboard Pipeline Company v. Grand Lodge of Maryland and Kenneth T. Bosley and Phyllis Bosley (as Intervenors), the United States District Court for the District of Maryland during the Spring Term, 1966, ordered that the boundary line between the property of Grand Lodge and the property of the Bosleys be stipulated as "the southernmost bank, a water course, as the common boundary," which is res judicata of the boundary line in the instant case. It was moved that the instant case be dismissed with costs to be paid by Grand Lodge. To this special plea, Grand Lodge filed a memorandum to which was attached a copy of the stipulation and a copy of the plat prepared by The Atlantic Seaboard Corporation showing the center line of the easement for the proposed gas pipeline. This plat shows the exact location where the right of way to be acquired coincided with the common boundary line of Grand Lodge and the Bosleys which was approximately 1,600 feet from the 3.4 acre tract. Judge Jenifer, after a hearing, filed an order dated November 21, 1967, that the special plea of res judicata be denied.

It is clear from the Atlantic Seaboard plat that the federal case involved a right of way over parcel 1 and not parcel 2 of the Grand Lodge land, and the location of the right of way is a substantial distance from the 3.4 acre tract. Indeed, that plat shows the 3.4 acre tract to be within the title line of Grand Lodge.

There being no identify of issues in the two cases, the federal case is not res judicata of the issues in regard to the lines in parcel 2, the 3.4 acre tract, so that the lower court properly denied the special plea of res judicata. Generally, there must be both identity of the parties and of the subject matter in the prior case, as well as a final judgment rendered after the issue or question has been tried on the merits. DeMaio v. Lumbermens Mutual Casualty Co., 247 Md. 30, 34, 230 A.2d 279, 281 (1967), and cases therein cited. See also Whitehurst v. Rogers, 38 Md. 503, 514-15 (1873) and 1 Poe, Pleading and Practice 655, page 681 (5th ed. 1925). Inasmuch as there was no identity of subject matter in the two cases, the doctrine of res judicata does not apply. Hence, it is unnecessary to decide whether the issues in the federal case were tried on their merits.

(c)

The Bosleys contend that their plea of "not guilty" raises no question. Rule T42 B provides that the effect of a plea of not guilty in an ejectment action "shall be held a confession of the possession and ejectment, and shall put in issue as between the parties only:

(1) The title to the land,
(2) The right to possession of the land, and
(3) The amount of damages."

It is rather clear what questions are raised by the plea of not guilty, and it is not apparent what point the Bosleys seek to raise in this regard. Their brief seems to suggest that, inasmuch as the jury allowed no damages and there being no judgment for damages with no cross-appeal by the Grand Lodge, there is no issue in regard to damages before us. If this is their point, they are undoubtedly correct and, indeed, the Grand Lodge has not briefed or argued that it is entitled to any damages.

(d)

The Bosleys appear to make the point that the deed of June 30, 1927, possibly indicated a "delivery" of the deed on February 7, 1931, which raises serious doubt in regard to the "verocity (sic) of the allegations" in the Bill of Particulars. The clerk's notation on the side of the recordation of the deed "(Del. per ticket Feb. 7, 1931)" obviously means that the clerk delivered the original deed to the person in possession of the deed ticket on February 7, 1931, not that the deed itself was delivered by the grantors to the grantee on that date. The certified copy of the deed of June 30, 1927, shows that it was recorded among the Land Records of Baltimore County on "July 5, 1927 at 12 M & Exd." in Liber W.P.C. No. 645, folio 333, etc., and was obviously delivered as between the parties on or prior to that date.

(e)

The Bosleys raise certain questions in regard to the pleadings and procedure in connection with the Warrant of Resurvey. It is not entirely clear what these questions are inasmuch as the lower court ruled in favor of the Bosleys in issuing a Warrant of Resurvey over the strenuous objection of the Grand Lodge that it was not necessary to do this in view of the Dollenberg plat and other plats.

Rule T44 provides for the issuance of the Warrant of Resurvey and states:

"a. Written Application.

An application for a warrant of resurvey shall be made in writing.

b. Requirements.

1. Before Issue.

A warrant of resurvey shall not issue unless it shall appear to the court that :

(a) The location of the land claimed is in dispute, or
(b) The location or extent of the land for the injury to which damages are claimed is in dispute, or
(c) The location of the dividing line is in dispute where the parties are claiming under the same title, or
(d) The plat is necessary for illustration.

2. Cost--Deposit.

The party seeking the warrant has deposited the estimated cost of executing the warrant with the clerk, if so directed by the court."

The Bosleys filed a petition for the issuance of the Warrant of Resurvey on February 16, 1968, to which the Grand Lodge filed its answer objecting to its issuance on February 27. On March 1, the Bosleys filed a motion ne recipiatur to the answer and requested a hearing on the motion. Judge Jenifer denied the motion ne recipiatur on May 7, 1968. The lower court, however, by correspondence with Mr. Ulrich, Mr. Bosley and counsel for the Grand Lodge and after a hearing, directed Mr. Ulrich to proceed with the Warrant of Resurvey as requested by the Bosleys. The correspondence was duly filed in the case on August 8, 1969, as the docket entries indicate, but no formal order was entered for the issuance of the Warrant of Resurvey. This is possibly the ground of the present objection by the Bosleys; but this question cannot be raised for the first time on appeal, no such objection having been raised below. Rule 885. In any event, Mr. Ulrich proceeded to make the survey and prepared the Warrant of Resurvey plat, which was in-

troduced into evidence as "Court Exhibit No. 3" without objection.

The Bosleys also now object to the procedure used in connection with the Warrant of Resurvey although, here again, it is difficult to ascertain what the objection is. The Bosleys requested that the jury visit the site and the lower court properly designated Mr. Ulrich, the County Surveyor who made the Warrant of Resurvey plat, to accompany the jury and to answer any questions propounded to him by any member of the jury in regard to the location of the claims of the respective parties, the location of any of the physical monuments on the land and the pipes put in by him at the locations of stones G.L.M. 2 to 9 indicated on the Howard plat. The Bosleys did not object to this procedure in the lower court so that the question is not properly before us. Rule 885.

(f)

Finally, the Bosleys raise a question, also not raised below, in connection with the alleged "conflict of interest" of the court reporter and of Mr. Hessey because of their membership in the Masonic order, in which order Mr. Bosley, himself, is a member. The point is also made that it is "fraud" for Mr. Hessey who has been counsel for the Grand Lodge to have testified in the case for the Grand Lodge.

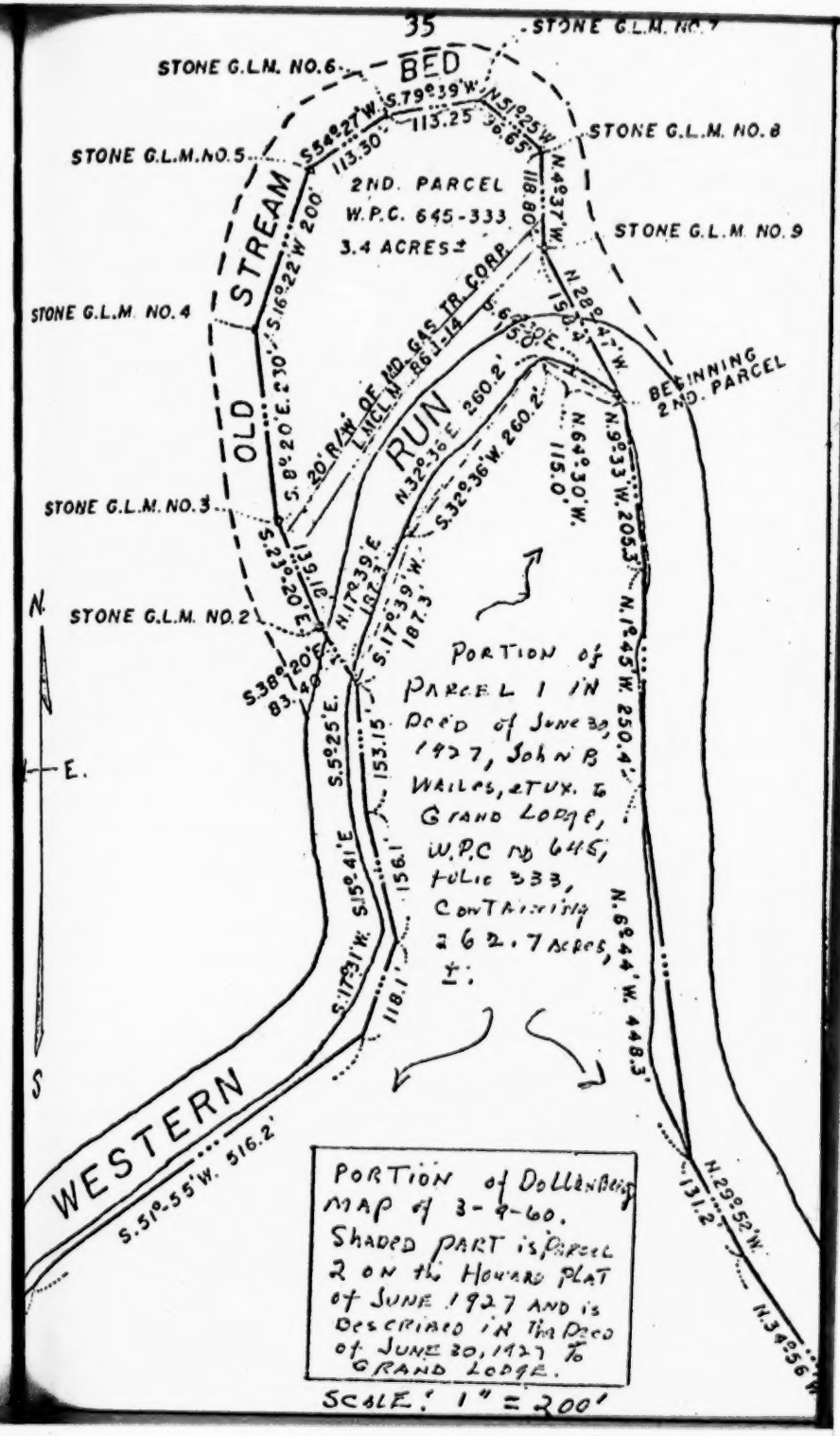
There is no attempt by the Bosleys to show that the record in this case is not accurate in every detail so that the "charge" against the court reporter is without any foundation whatever.

The "charge" against Mr. Hessey is also without foundation. When Mr. Hessey - who had initially signed the pleadings in the case as co-counsel - realized that it would be necessary for him to testify, he withdrew his appearance

as trial counsel, as the record indicates, and took no part in the trial of the case. His conduct was entirely proper.

As we have indicated, these questions were not raised by the Bosleys in the lower court and are not properly before us on appeal. Rule 885.

JUDGMENT AFFIRMED, THE APPELLANTS TO PAY THE COSTS.


35
STONE G.L.M. NO. 7
STONE G.L.M. NO. 6
BED
S.79°39'W.
N.51°25'W.
113.25
36.65
STONE G.L.M. NO. 8
STONE G.L.M. NO. 5
S.54°27'W.
113.30
2ND. PARCEL
W.P.C. 645-333
3.4 ACRES±
N.40°37'W.
118.80
STONE G.L.M. NO. 9
STREAM
S.16°22'W. 200
N.28°41'W.
150.4
STONE G.L.M. NO. 4
OLD
S.8°20'E. 230'
20' R/W OF IND. GAS TR. CORP.
L.NCL.W. RG 1-14
S.6°50'E.
BEGINNING 2ND. PARCEL
RUN
N.32°36'E. 260.2'
S.32°36'W. 260.2'
N.64°30'W.
115.0'
N.9°33'W. 205.3'
STONE G.L.M. NO. 3
S.2°20'E.
187.6'
N.17°39'E.
187.3'
S.17°39'W.
187.3'
N.
STONE G.L.M. NO. 2
S.38°20'E.
83.40'
PORTION of PARCEL 1 IN DEED of JUNE 30, 1927, JOHN B WAILES, ETUX. to GRAND LODGE, W.P.C. NO 645, FOLIO 333, CONTAINING 262.7 ACRES, ±.
N.18°45'W. 250.4'
E.
S.5°25'E.
153.15'
S.15°41'E.
156.1'
S.17°31'W.
118.1'
N.68°44'W. 448.3'
S.
WESTERN
S.51°55'W. 516.2'
N.29°52'W.
131.2'
N.34°56'W.
PORTION of DOLLENBERG MAP of 3-9-60. SHADED PART is PARCEL 2 ON the HOWARD PLAT of JUNE 1927 AND IS DESCRIBED IN the DEED of JUNE 30, 1927 TO GRAND LODGE.
SCALE: 1" = 200'

EXTRACT OF MOTION FOR REARGUMENT

KENNETH T. BOSLEY, et. ux.	*	In the Court of
v.	*	Appeals of
THE GRAND LODGE OF ANCIENT	*	Maryland
FREE AND ACCEPTED MASONS	*	September Term, 1971
OF MARYLAND	*	No. 13

To the Honorable, The Judges of Said Court:

Motion of Kenneth T. Bosley and Phyllis B. Bosley, his wife, Appellants, in said cause, for leave to reargue said cause and as reasons for said reargument respectfully set forth:

I. For the purposes of the Motion, as to the matters stated in the Opinion and as being before the Court, the first paragraph of page 1 is reduced to its component parts with pertinent initial comments intersperced therewith and more specific comments later set forth in detail, as follows:

1. Sentence (1) explicitly sets forth, "This Appeal involves '<u>an action injectment</u>' being the basis of the entire proceeding and without the consideration of other pleas and pleadings not specifically relating to the 'Ejectment Proceeding,' must cause the Appellee to fail under its '<u>Declaration in Ejectment</u>.'"

2. Sentence (2) "The land involved is a 3.4 acre tract to which the Appellee claims good record title and title by adverse possession" but the 3.4 acre tract, being but a part of a 36 acre parcel to which the Appellee claims good record title under a deed, dated 1850 (77 years prior to the deed to the Appellee, dated 1927) and the claim of title of the Appellee can only be established under (1) a valid Declaration in Ejectment and pursuant to a Warrant of Resurvey and a Resurvey made according to the

current practice, pleading and rules of Resurvey in Ejectment cases, descended from the Laws of England, now the Common Law of Maryland, as set forth in the Lecturer of the late Walter Dorsey, Chief Judge of Baltimore County Court, where the land in dispute now lies, and Associate Judge of the Court of Appeals of Maryland, also set forth in the Work of John Prentis Poe, Esquire, on Pleading and Practice in Maryland, 5th Edition, now set forth and brought up to date by Harry M. Sachs, Jr., Esquire, Poe's Pleading and Practice, 6th Edition, and in the statute laws of Maryland, article 91, secs. 1 to 8 and also in Maryland Rules 9B (1963 Replacement Volume), Rules J40, J41, J42, J43, J44 of the Honorable Court, p. 17 of opinion. Sentence (2) continued: "and title by adverse possession" which cannot be asserted and claimed except by proper proof under the aforesaid Laws of England, now the Common Law of Maryland, treatises, Laws of Maryland and Maryland Rules and then only after a proper Resurvey and Location of the lands to be resurveyed and the Claims and Pretensions of each of the parties have been located so that the verdict of the Jury and the Judgment of the Lower Court can be exercised (Rule J41, Power of the Sheriff). "The Sheriff of the County in which the action is brought shall have power to execute a writ of habere facious possession for all said land," which is correctly surveyed according to the rules so the Sheriff will know, if the Plaintiff is successful, where the 3.4 acres is located with reference to the 36 acres claimed by the Defendants as to their claims and pretensions.

3. Sentence (3) "The two principal questions before us are whether the Trial Court erred: (1) in its Instructions to the Jury in regard to the elements of adverse possession and (2) in declining the grant the motion of the Defendants-Appellants for a directed verdict or their motions for a judgment n.o.v. because of

insufficient evidence in the case for the Jury to find for the Plaintiff, Grand Lodge, on the basis of either adverse possession or legal record title." It is respectfully submitted that as stated above in the introductory paragraph "more specific comments later set forth in detail" as to (3) Sentence (Items 1 and 2) will follow later although said Items cannot be of first importance in the Opinion.

4. Sentence (4) "The Appellants raise additional questions to which reference will later be made. These matters will also be considered later under said sentence as they have been considered by the Court.

II. For the purpose of a clear and legal understanding of the matters briefly set forth above in Sentences (1), (2) and (3) being the very basis of the action of ejectment it is fundamentally necessary to discuss this action from its ancient beginning in England and to follow its development through the authorities above mentioned. It is not an ordinary form of action and the Plaintiff (Appellee) can only succeed by meeting all its requirements as hereinafter set forth "For the Plaintiff can recover only on the strength of his own title" McHenry, Chapter II, Page 115.

1.a. Action of Ejectment-Declaration. "The declaration is the first process." "Dorsey on 'Ejectment,'" page 15, paragraph 2. As to this there is no dispute and the Plaintiff (Appellee) has by the first statement in its declaration made it an action in Ejectment and it must meet the requirement of that ancient form of action as adequately recognized under "Special Proceedings, Subtitle J, Ejectment" of the Maryland Rules of the Court of Appeals which has provided special rules of pleading, being Rules J40, (1), (2), (3) and (4), J41, J42, J43, and J44. Generally speaking these rules have been in effect long before they were

promulgated by the above rules (T40).

* * * * *

Attached hereto is a certified copy of a model Warrant of Resurvey and Copy of Docket Entries in No. 2 Trials, September Term, 1930, the same being the case of Abraham Smith and Amanda J. Smith vs. Henry C. Ryall.

SURVEY PLAT

The above plat is a matter of grave concern in considering the entire proceedings from consideration of the Warrant of Resurvey to the Court Trial. The summary and Report of the Surveyor intended to be the Certificate and Return filed on May 12, 1970, indicates the land of Grand Lodge was surveyed first and laid down on the Surveyor's plat and refers secondly to a 1959 deed of the Bosley land being used in their survey but said deed contains no description. The survey plat of the 3.4 acres appears to be surveyed in detail but a visual examination of the plat clearly shows the 36 acre tract of the Defendants (Bosleys) was not surveyed as the area outside the 3.4 acres or 32.6 acres and the only conclusion to be made is that it was not surveyed in the field. It is very apparent that the plat attached to the opinion is most unusual as it entirely excludes the land of the Bosleys, includes matters of a prejudicial nature such as parcel No. 1 not in the declaration as a descriptive parcel. It does not include the gasline right of way over the entire 36 acres including the 3.4 acre parcel; and for other reasons to be shown at the time of Reargument.

RULING OF COURT ON DECLARATION, BILL OF PARTICULARS AND DEMURRER

THAT THE DEMURRER OF THE DEFENDANT'S TO THE PLAINTIFF'S DECLARATION FOR THE REASONS AS SET FORTH ABOVE AND IN THE BRIEF, "ARGUMENT" PAGE 39, SHOULD HAVE BEEN SUSTAINED.

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SPECIAL PLEA - RES JUDICATA

This Plea with Memorandum of Plaintiff, Legal Requirements, Stipulation Order and Order of Court has been fully considered in Defendants' (Appellants') Brief, pages 4, 5, 6, 7 and 8. It need only be considered in relation to the Opinion of the Court, page 18(b).

It was before the United States District Court, Chief Judge Roszel C. Thomsen, Baltimore Maryland, at Spring Term, 1966, and it was ordered "that the boundary line between the property of the Grand Lodge and the property of the Bosley's be stipulated as 'the southernmost bank, a water course, as the common boundary', which is Res Adjudicata of the boundary line in the instant case." The purpose of the stipulation was to set forth the termination of the pipeline at the Western Run in relation to the ownership of the lands of the Bosley's with the water course on the easterly side and the Grand Lodge on the westerly side of Western Run. This was essential to the termination of the pipeline as to the Seaboard Pipeline Company on the one hand and to Grand Lodge on the other hand and to said Grand Lodge and the Bosleys, Plaintiff and Defendants and also it was a point on the common boundary line of said two parties from the York Road, as referred to by the surveyor, E47 and E48, and continuing therefrom to and along the same (southerly) line of said Western Run, the common boundary line as described in the basic title deed of the Defendants, dated 1850. A stipulation as to the aforegoing proceedings was entered into by John H. Hessey and Walter C. Mylander, Jr., Attorneys for (Plaintiff-Appellee in the case at bar and in the Court of Appeals) the Grand Lodge, and Kenneth T. Bosley, Phyllis B. Bosley by Kenneth Thomas Bosley, her attorney in fact, on January 27, 1966, with an Order thereto by Chief Judge Roszel C. Thomsen, U. S. District Court on the same date and those parties are bound by that

stipulation as to the termination of the pipeline on the South or Southwesterly side of Western Run that the Water Course was the land and water rights of the Bosleys and the same is true under the 1850 deed and under the purported Resurvey of the 3.4 acres on the North side of Western Run. * * *

* * * * *

When the aforegoing matters have been considered, pages 18 and 19 (b) there, clearly appears "identity of issues in the two cases," Federal and Case at Bar and is absolutely Res Adjudicata of the issues in regard to the lines of parcel (2), the 3.4 acres; there was both identity of subject matter and a final judgment rendered after the issue or question had been tried on the merits. The Federal Court had before it in the pipeline case and in this Special Plea case, as set forth in the signed stipulation, all the parties involved. John Prentiss Poe, Vol. 1, Pleading, Secs. 656, 683.

ORDER OVERRULING PLEA RES ADJUDICATA SHOULD HAVE BEEN REVERSED.

* * * * *

* * * * *

1. That this Court has not considered that Wailes was only an agent for the Grand Lodge during their 1927 purchase. A previous deed in the claim of title of the Grand Lodge recorded in 1926 from Emma Wieskettal, widow to John Wailes shows no 3.4 acres, no total acreage, and no lines crossing the Western Run River. The Grand Master of the Grand Lodge was Warrent S. Seipt at the time and who was also president of the title company concurrent with the purchase of the Grand Lodge property during 1926 and 1927. Walter Mylander, Sr. was also attorney for both the Grand Lodge and the title company.

2. That the Court has not considered that the Grand Lodge's only contention or claim of possession up until September 28, 1966, was surveying the parcel in dispute in 1927.
(Cited in paragraph 2 of the Grand Lodge's answer to the Bill of Particulars)

3. That the Court has not considered that the 1927 survey was made in a wilderness in a heavy undergrowth of vines and in a vegetation area along a river bank. The Grand Lodge's own witness and resident of the property recalled that the Bosleys sold trees off the dispute parcel in 1959.
(Cited on page E141 testimony of Frank Smith, Jr. and documented in a Circuit Court case in Baltimore County Bosley vs. Glenn Gall Lumber Company and McCurry, Case No. 44665. Original attorney for the Defendants was Judge Walter M. Jenifer who later withdrew his appearance when he was placed on the bench in 1964.)

(Also cited in the deposition of Cassell on page 7 and 8, copies attached, as to the bushes and wooded areas.)

4. That the Court has not considered that to claim land by avulsion or adverse possession the acts of the change or possession must be unequivocal.
(Cited for adverse possession in the Blickenstaff case, 243 Md. 164, cited in Bosley's motion for directed verdict as "clear and positive preponderance of evidence" (E25). Cited for avulsion - Nebraska vs. Iowa - 143 U. S. 359 wherein the change in stream occurred during a specific flood on July 5, 1867.)

5. That the Court has not considered conflicting testimony of the Grand Lodge's own member, Mr. Cassell, and also their surveyor and civil engineer. The Grand Lodge's bill of

particulars in paragraph five stated "There are no boundary markers to be found at the present time, all of the same having been destroyed by the Defendants as foresaid." Paragraph 3 states, "The date that damages were incurred was March 9, 1965, on which date the property was bulldozed and the monumental markers were destroyed by the Defendants." (E11) Mr. Cassell first went to the property in January, 1966 and falsely stated he found five of the stones "still planted on the ground". (E98) In addition the Court should also review the false testimony of Mr. Frank Smith. In his deposition he stated "I think I've seen a total of three (Markers) on this particular part of the property." Yet his testimony was (on page 11), "...some of them were covered up with underbrush, so forth and so on, and we really had a rough time finding them..." However, his testimony three years later was: Q. Do you remember how many you could locate? A. I located them all at the time they were on the plat. (E142)

6. That the Court has not considered the variance between Mr. Atwater's statement of facts in his brief and the facts contained in the extract. Some of these facts are the assertion of ownership of the property by the Bosley's grandfather when he sold the property in 1940 by a deed from Matthews recorded in Liber 1114, folio 502 among the Land Records of Baltimore County. Other acts of possession by the Bosleys were not considered which were payment of taxes on 36 acres on the South Side of Thornton Mill Road, the rental of the property from 1943 through 1948 and the cutting of timber in 1959. Further, the aged witnesses produced by the Bosleys, who were neighbors in the area, never heard of a stream change or that the Grand Lodge intended to claim the property. These witnesses were Mr. Tawney (E177), Mr. McCartha (E181) and Mr. Cedrone (E173). Mr. McCartha was also a farm hand for the Grand Lodge during the 1950's.

7. That the Court has not considered that the

meander line established for the natural boundary between the Bosleys and the Grand Lodge was a water course of a river. For one party to invade approximately 500 feet of that approximately mile and half of boundary on unimproved land when that natural boundary has been fixed for 100 years establishes an injustice of the highest order. The visible and fixed boundaries of the Bosley property are the boundaries of the four roads and the Western Run. Cited for visible and fixed boundaries:

Bishop vs. Stackus - 206 Md. 493
Tambaro vs. Miller - 203 Md. 329

WHEREFORE the Defendants (Appellees) and Movants pray the Honorable Court to grant their Motion for Reargument.

s/
Louis C. Merryman
Attorney for Movants

s/
Kenneth T. Bosley
s/
Phyllis B. Bosley
Appellants

MEMORANDUM OF ADDITIONAL AUTHORITIES

1. Linthicum vs. Coan 1886 - 2A 2 d 826, 64 Md. 439

"Land imperceptibly or gradually formed by accretion or subsidence or a river, belongs to the adjacent owner, but when suddenly formed belongs to the State."

2. C.J.S. Adverse Possession Section 205

"Title to an accretion follows the title of the riparion land to which it is attached, regardless of whether the latter title was acquired by deed or adverse possession."

3. Conrad vs. Williams 121 Md 35, 88Z 36 (1913)

"Call for creek side prevailed over distance specified in describing boundry, especially in view of possibility that disagreement was due to alluvion or receding waters in intervening years." Calls for water courses control calls for courses and distances."

4. Bryan's Leessee vs. Harvey 18 Md. 113

"In disputes arising as to the boundry lines between adjoining tracts, a prior conveyance takes precedence over a subsequent one."

5. Harrison & Johnson 190 - Dorsey's Lessee vs. Hammond

"Lines of an elder survey prevail over those of a junior survey."

6. Parran vs. Wilson - 160 Md 604 - 154 A. 449

"Natural monuments are object permanent in character, which are formed on the land as they were placed by nature, such as stream, also highways or roads because of its visi-

bility, permanence and stability and definite location, independent of measurement."

7. C.J.S. Boundries, Section 119

"Instruction in action to determine boundries must be correct, consistent, complete and not misleading or confusing."

8. U. S. vs. Gallas 1967, 269 F Supp 141

"A natural monument controls as artifical monument. Southeast corner of grantor's property could properly be classed as a Natural monument where it was known and established boundry lines."

9. Delphey vs. Davage - 1962 - 227 Md 373, 177A 2d. 249.

"A natural monument controls an artificial monument."

10. Sterling vs. Sterling - 211 Md 493, 128A2d 277

"..... can not acquire land by adverse possession that is under water." (Chief Judge Brune)

11. Beatty vs. Mason, 30 Md 409

"Surveying land is not such a distinct act of possession as will justify reasonable presumption of an ouster, or that the party went upon the land with palaple intent to claim possession of his own."

EXHIBIT A
PROPER FORM OF AN ACTUAL WARRANT OF RESURVEY

STATE OF MARYLAND, SCT:

The State of Maryland,

To Peter S. Shockley, Surveyor of Wicomico County, Greeting:

WHEREAS, at a Circuit Court begun and held at Salisbury, on the 1st Monday of July in the year of our Lord 1927 it was so far proceeded in a certain plea of Trespass quire clausum fregit, in said Court pending between a certain Abraham Smith and Amanda J. Smith, plaintiffs and a certain Henry C. Ryall defendant that it was considered absolutely necessary for better information of the said Court and Jury in the truth of the premises that is to say

all that land situate and lying in Nutters Election District, Wicomico County and State of Maryland, located on the Southwesterly side of and binding upon the County Road leading from the William H. Coulbourn farm to Nutters Voting House, bounded on the Southeast by the land of said defendant, Henry C. Ryall; on the Southwest by the center of the run of Ruark's Branch, and on the Northwest by the land of Ida Ruark, containing 30 acres of land, more or less, being the same land that was conveyed to the said Abraham Smith and Amanda J. Smith, his wife, as tenants by the entireties, by Henry M. Jones, by deed dated February 1, 1924, and recorded among the Land Records of said Wicomico County, in Liber J.C.K. No. 133, Folio 554;

be carefully re-surveyed and laid out according to the ancient meets and bounds thereof, as in the original certificate of survey thereof, as expressed to the end that the said lands in con-

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troversy, and the claims and pretenses of both parties may more plainly and indifferently appear to the Court and Jury; therefore you the s said Surveyor are hereby commanded carefully to resurvey and lay out, as well the said lands in dispute as any other lands adjacent thereto which shall be thought necessary by the said plaintiff or defendant to be laid out for the better illustration of the matter, according to the claims and pretensions of the plaintiff in the presence of the defendant if he being summoned think fit to be present and without any interruption of him the defendant or if absent, notice to be left at his place of residence or last place of abode, and likewise survey and lay out the said land in dispute as aforesaid, according to the claims and pretensions of the defendant in the presence of the plaintiff if he being summoned think fit to be present without any interruption of them the said plaintiffs or if absent notice to be left at their place of residence or last place of abode, and you the said surveyor are hereby empowered to examine upon oath any witness or witnesses that by either of the parties shall be produced in relation to the same and you the said surveyor are hereby commanded to give both the said parties thirty days notice before the day of execution of this writ, and you the said surveyor are hereby commanded to return three fair certificates and plots therefore drawing the pretenses of the plaintiff in blacklines and the pretenses of defendants in pricked lines, as well under the hand and seal of you the said surveyor to the said Circuit Court to be held at the town of Salisbury on the 2nd Monday of September 1927, that the said Court and Jury; being rightly informed of the truth of the premises may further proceed therein as to Justice, appertains, etc.

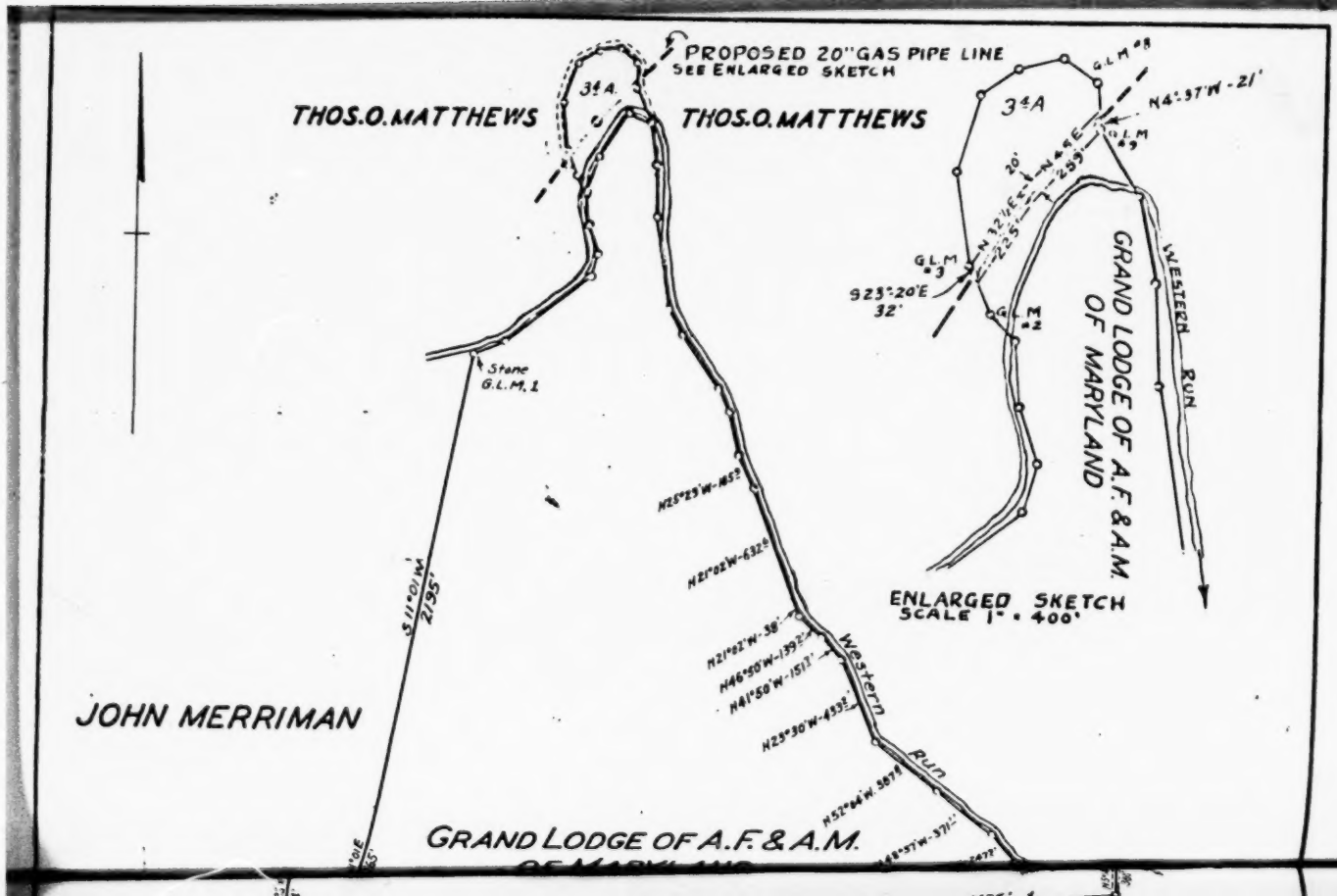
Witness the Hon. John R. Pattison Chief Judge of the First Judicial Circuit of Maryland this 4th day of July 1927.

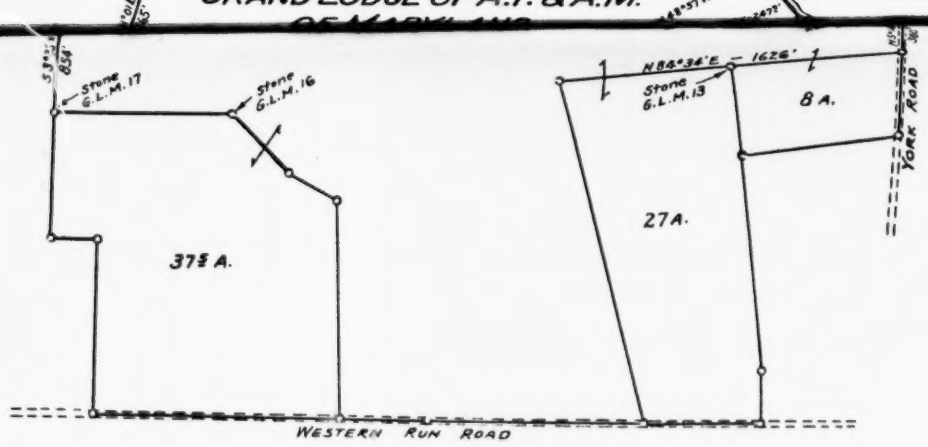
Issued Aug. 5, 1927 /s/ J. Clayton Kelly,
Clerk

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing reply brief of the petitioners were mailed by first class mail, postage prepaid, to Charles C. W. Atwater, of Mylander and Atwater; 402 North Charles Street; Baltimore, Maryland 21201, Attorney for Respondent, on this ___ day of June 1972.

Kenneth T. Bosley


PROPOSED 20" GAS PIPE LINE
SEE ENLARGED SKETCH
THOS. O. MATTHEWS
3¼ A.
THOS. O. MATTHEWS
Stone
G.L.M. 1
S 11° E
2195'
JOHN MERRIMAN
N25°25'W-185'
N21°02'W-632'
N21°02'W-38'
N46°50'W-139.2'
N41°50'W-151.1'
N25°30'W-453.3'
N52°04'W-567.8'
N48°57'W-371.1'
Western Run
GRAND LODGE OF A.F. & A.M.
3¼ A
G.L.M. #1
G.L.M. #2
G.L.M. #3
G.L.M. #4
N4°-37'W-21'
N 32½° E
20'
25.5'
25.9'
S23°-20'E
32'
GRAND LODGE OF A.F. & A.M. OF MARYLAND
WESTERN RUN
ENLARGED SKETCH
SCALE 1" = 400'



MARYLAND GAS TRANSMISSION CORP.

MAP FROM SURVEY
SHOWING LOCATION OF
PROPOSED 20 INCH GAS PIPE LINE
ON LAND OF

GRAND LODGE OF A.F. & A.M. OF MARYLAND

EIGHTH DISTRICT - BALTIMORE COUNTY, MD.
SCALE:-1" = 800' OCT. 4, 1930

Book No R/W East Page 8
Station 13093+50 to 13115+46